IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1200

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL.,

Petitioners,

vs.

THE HONORABLE S. HUGH DILLIN, UNITED STATES DISTRICT JUDGE, FOR THE SOUTHERN DISTRICT OF INDIANA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1260

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL.,

Petitioners,

vs.

THE HONORABLE S. HUGH DILLIN, UNITED STATES DISTRICT JUDGE, FOR THE SOUTHERN DISTRICT OF INDIANA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

Pursuant to Rule 24(4), petitioners submit this Reply to the Memorandum for the United States, which was filed in opposition to the petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners do so because the Memorandum for the United States appears, almost totally, to misconceive the questions presented to this Court in the Petition, and the reasons for the Petition.

I.

THE INTERLOCUTORY ORDER v. FINAL JUDGMENT QUESTION.

The questions raised in this Petition are, ultimately, "interlocutory" in approximately the same way that the holdings in *Brown I*[1] in this Court, were merely "interlocutory", and *Brown II*,[2] was "final".

In so far as their citation is concerned, petitioners do not challenge the authorities cited by the United States on interlocutory appeals (page 5, U. S. Memo). Petitioners say, simply, that they have no relation to this Petition.

And they are, in fact, contrary to the position taken by the United States on brief in the United States Court of Appeals for the Seventh Circuit in *United States* v. *School Commissioners of Indianapolis*, No. 72-1031 (the filing number is in the Seventh Circuit, and the appeal is hereafter referred to as "*School Commissioners of Indianapolis*"); from which case this dispute arose.

A. The Seventh Circuit Appeal.

The Solicitor General would apparently characterize the present appeal on the merits in the Seventh Circuit in *School Commissioners of Indianapolis, supra*, as being a kind of "interlocutory affair"; with final remedies to be determined later in the district court.

But on brief in the Seventh Circuit, the United States said this:

> "The district court, in addition to *permanently* enjoining the [Indianapolis School Board] from discriminating on the basis of race in the operation of the Indianapolis school system, ordered the [Indianapolis School Board] to take several specified actions, * * *"

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1. *Brown* v. *Board of Education*, 347 U. S. 483 (1954).
2. *Brown* v. *Board of Education*, 349 U. S. 294 (1955).

(Brief of the United States, in *School Commissioners of Indianapolis*, page 36) (Emphasis added.)

* * * * *

"[The Indianapolis School Board does not] in [its] brief, specifically attack any of the provisions of that order. Rather, since they are *attacking the finding of a constitutional* violation, implicit in their position is the notion that any remedial order is inappropriate." (Brief of the United States, in *School Commissioners of Indianapolis*, page 38) (Emphasis added.)

These statements made on brief come after the statement of the issues presented in that appeal, in which the United States said that the question and issue presented was whether the district court in Indianapolis erred in finding that the Indianapolis School Board operated a *de jure* racially segregated school system. The United States then said that the second issue was whether the district court erred in prescribing interim relief against the Indianapolis School Board to remedy the *de jure* segregation.

Finally, in footnote 8 of the brief of the United States in that appeal, the United States declares that the several parties added in the district court [the petitioners herein] and the further proceedings now pending in the district court, "is not involved in the present appeal."

In short, what the Solicitor General would regard here as a mere interlocutory continuum, is a distinct and separate matter in the appeal in the Seventh Circuit.

In summary, on appeal at the present time in the Seventh Circuit is the final determination by the district court in its August 18, 1971 order that the Indianapolis School Board committed a constitutional law violation. That final determination, according to the brief of the United States, is now to be argued and presented in that court. It is that final determination which serves as a basis for the imposi-

tion of remedies against the Indianapolis School Board. It is that final determination which the United States would here maintain can serve as a basis for taking remedial action against the petitioners, who were never a party to or a part of the Indianapolis suit. This is then called, "interlocutory."

B. The Remedies Question.

Regardless of the epithet used by the United States, the petitioners were never a party to that proceeding, they were never accused prior to the final determination by the United States, or any other person or party; they were never invited to participate or observe; nothing; and now they face the final determination by the district court that another school board, the Indianapolis School Board, violated the law, and that that violation can serve to effect equitable remedial power over these petitioners.

It is no substantial exaggeration of the United States' position to say that discrimination having been found in the original defendants in *Brown I*, ergo, equitable remedies in the district court in Indianapolis now extends to these petitioners.

But the United States does not go that far, at least on brief before the Seventh Circuit.

There in its conclusion, it said:

> "For the reasons discussed above, the August 18, 1971 Order of the district court should be affirmed, and the case remanded for further proceedings. On remand *the court should fashion a remedy based on the extent of the violation* (see *Swann v. Board of Education, supra*, at 17) and on the 'facility [of equity] for adjusting and reconciling public and private needs.' " (Brief of the United States, in *School Commissioners of Indianapolis*, page 40) (Emphasis added.)

There the United States does recognize that this Court held, in part, in *Swann* v. *Board of Education*, 402 U. S. 1

(1971), that before a remedy can be imposed against a school board, a constitutional violation must first be found.

> "In seeking to define in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised *only on the basis of a constitutional violation.*" *Swann* v. *Board of Education*, *supra* at 16 (Emphasis added).

It is precisely that proposition of law from this Court which superintends and refines the cases from the Court of Appeals for the Fifth Circuit, on which the Solicitor General relies, pages 6-7, *U. S. Memo.*

Perhaps the Solicitor General gave implicit recognition to these principles when he said:

> "In effect, petitioners are challenging the power of the district court to launch its consideration of final remedies until appellate review of the finding of discrimination and the grant of interim, partial relief is brought to a conclusion." (Page 4-5, *U. S. Memo.*)

Not quite. Petitioners "in effect" challenge the power of the district court to launch its consideration of final remedies upon the petitioners (not the Indianapolis School system), because the petitioners were never a party in any way in the Indianapolis school suit, and against the petitioners no finding has ever been made of any kind.

II.

THE "EXERCISE IN FUTILITY" ASSERTION.

A. The Solicitor General asserts that the complaint in intervention seeks to raise the same matters which were specifically designated for further consideration in the district court's opinion.

Petitioners must conclude that the Solicitor General has not read the amended complaint filed by the intervening plaintiffs. It does in fact go very far beyond the August 18, 1971 opinion of the trial court. It does seek remedies

greatly different than those sought by the United States in its desegregation suit. It is set out in full in the Appendix to this Reply.

B. The Solicitor General states that the relief sought by the petitioners "would be an exercise in futility in any event" (Page 7, *U. S. Memo*). That is simply remarkable.

First, there is the matter of due process of law, not regarded by the petitioners as a "futility", and the proposition that one is not bound or affected by a remedy of a court unless one has first had an opportunity to be heard. The district court agreed with regard to the findings, Appendix C, page 14, *U. S. Memo.* The Solicitor General disagrees with regard to the "remedies".

Secondly, there is the internal inconsistency, in that if the question is merely one of "remedies" as the Solicitor General suggests, then there would not be a need for a new and different complaint in any event.

Thirdly, there is the effort by the Solicitor General to suggest, implicitly, that the petitioners seek relief from Judge Dillin—but that this is "futile" because a new complaint would be assigned to him in any event.

Judge Dillin is but the named party here. It is not the person of Judge Dillin or his court or his presence that the petitioners are concerned with. It is the equitable power and the equitable remedies which any federal district judge can impose after a finding of a violation of constitutional law based upon the presence of a dual school system, which is of concern to the petitioners—because, again, against them there is no such finding, and no available federal equitable power.

C. If the private plaintiffs wish to file a complaint making the same allegations, then so be it. Whether such an action would be assigned to Judge Dillin, to any other sitting federal district court in Indianapolis, or correctly for that matter to a three-judge district court, is of no moment to the petitioners in this matter.

What is of considerable moment to the petitioners is that there has been a finding against the Indianapolis School system, and that, as a result, the United States and the district court seek to impose that finding upon petitioners, in effect, by subjugating the petitioners to the "remedies" stage of that suit. And the cover for this astonishing event is the fact that two children, alleging themselves to be representatives of an enormous class of children, have filed a complaint "in intervention" in the old lawsuit.

It is precisely the result of this attempted power play which has brought petitioners here to seek this Writ.

It is submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

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The Metropolitan School Districts of Lawrence, Warren and Wayne Townships, Marion County, Indiana.

The School City of Beech Grove, Indiana.

The Franklin Township Community School Corporation, Marion County, Indiana.

Appendix

UNITED STATES DISTRICT COURT
Southern District of Indiana,
Indianapolis Division.

UNITED STATES OF AMERICA,
Plaintiff,

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, (by their parent and next friend, Mrs. Ruby L. Buckley, on behalf of themselves and all other school age children, residing in the Indianapolis Standard Metropolitan Statistical Area),
Intervening Plaintiffs,

vs.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Defendants,

EDGAR D. WHITCOMB, as Governor of the State of Indiana,

THEODORE SENDAK, as Attorney General of the State of Indiana,

JOHN J. LOUGHLIN, as Superintendent of Public Instruction of the State of Indiana,
Added Defendants,

THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA,

THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA,

THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA,

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,

THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA,

THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA,

THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA,

THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA,

THE BEECH GROVE CITY SCHOOLS, MARION COUNTY, INDIANA

THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA,

THE GREENWOOD COMMUNITY SCHOOL CORPORATION, JOHNSON COUNTY, INDIANA

THE CARMEL CLAY SCHOOLS, HAMILTON COUNTY, INDIANA,

MT. VERNON COMMUNITY SCHOOL CORPORATION, HANCOCK COUNTY, INDIANA,

GREENFIELD COMMUNITY SCHOOL CORPORATION, HANCOCK COUNTY, INDIANA,

MOORESVILLE CONSOLIDATED SCHOOL CORPORATION, MORGAN, INDIANA,

PLAINFIELD COMMUNITY SCHOOL CORPORATION, HENDRICKS COUNTY, INDIANA,

AVON COMMUNITY SCHOOL CORPORATION, HENDRICKS COUNTY, INDIANA,

BROWNSBURG COMMUNITY SCHOOL CORPORATION, HENDRICKS COUNTY, INDIANA,

EAGLE-UNION COMMUNITY SCHOOL CORPORATION, BOONE COUNTY, INDIANA,

THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,
Added Defendants.

No. IP 68-C-225
Amended Complaint of Plaintiff-Intervenors

Plaintiff-intervenors allege:

1. This Court has jurisdiction of action pursuant to 42 U. S. C. 1983 and 1988, 28 U. S. C. 1343(3), 2201 and 2202, and the Fourteenth Amendment to the Constitution of the United States.

2. Plaintiff-intervenors are Negro children and their parent who reside in the areas served by public schools maintained and operated by one or more of the defendant school authorities and who are eligible to attend such public schools. Plaintiff-intervenors sue on behalf of themselves and all other school-age children, and their parents, similarly situated in the areas served by the defendant school authorities. Plaintiff intervenors satisfy all requirements of Rule 23, F. R. Civ. P., and in particular the class represented is so numerous that joinder of all members is impracticable, these are questions of law and fact common to the class, the claims of plaintiff-intervenors are typical of the claims of the class, and plaintiff-intervenors will fairly and adequately protect the interests of the class.

3. Defendant Edgar D. Whitcomb is the Governor and chief executive officer of the State of Indiana, and as such he is charged with the faithful execution of the Constitution and laws of Indiana in a manner consistent with the Constitution and laws of the United States.

4. Defendant Theodore Sendak is the Attorney General and chief legal officer of the State of Indiana, and as such he is responsible for the enforcement of the Constitution and laws of Indiana in a manner consistent with the Constitution and laws of the United States.

5. Defendant John J. Loughlin is the Superintendent of Public Instruction of the State of Indiana and as such is charged by law with the administration of the system of public instruction and general superintendence of the business relating to the common schools in a manner consistent

with the requirements of the Constitution and laws of the United States, and he is obligated to implement the public policy of the State of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunities for all regardless of race, creed, national origin, color or sex, and to eliminate and prohibit segregated or separate schools or school districts on the basis of race, creed, or color. He is further obliged by law to report and recommend to the general assembly remedies for observed imperfections in the operation of the public schools.

6. Defendants Board of School Commissions of the City of Indianapolis; Metropolitan School District of Washington Township; Metropolitan School District of Lawrence Township; Metropolitan School District of Warren Township; Franklin Township Community School Corp.; Metropolitan School District of Perry Township; Metropolitan School District of Decatur Township; Metropolitan School District of Wayne Township; Metropolitan School District of Pike Township; School Town of Speedway; and Beech Grove City Schools; Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corp., Hancock County, Indiana; Greenfield Central Community School Corp., Hancock County, Indiana; Greenwood Community School Corp., Johnson County, Indiana; Mooresville Consolidated School Corp., Morgan County, Indiana; Plainfield Community School Corp., Hendricks County, Indiana; Avon Community School Corp., Hendricks County, Indiana; Eagle-Union Community School Corp., Boone County, Indiana; and Brownsburg Community School Corp., Hendricks County, Indiana, are all common school corporations organized and existing under the laws of the State of Indiana with geographical boundaries within Marion County, Indiana, or within the Indianapolis Metropolitan Statistical Area as defined by the United States Census,

and acting as agents of the State of Indiana to fulfill the duty imposed upon it by the State Constitution to provide for a general and uniform system of common schools; and they are obliged to discharge that responsibility in a manner consistent with the requirements of the Constitution and laws of the United States; and they are proper parties defendant to this action.

7. The defendant Indiana State Board of Education is a public corporate body in general charge of the schools of the State of Indiana.

8. All defendants reside or perform their official duties, in which capacity they are sued, in the southern judicial district of Indiana.

9. By their present method of maintaining and operating separate school corporations, the defendants have effected racial segregation and discrimination in the operation of public schools and school systems serving Marion County, Indiana, and the Indianapolis metropolitan area, in violation of the rights secured to plaintiff-intervenors by the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section I, of the Constitution of Indiana.

10. Section 314 of Chapter 173 of 1969, Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), which chapter is known as the "Consolidated First Class Cities and Counties Act" is unconstitutional and void insofar as its purports to exempt from the scope and effect of said act the consolidation of all school corporations within Marion County, Indiana. The purpose and effect of such exemption, as further implemented and enabled by the provision of Chapter 186 of the Acts of 1961, Burns Ind. Stat. Ann. § 28-2338 to 28-2347 (1968 Cum. Supp.) and Chapter 52 of the Acts of 1969, Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.) have been and are to perpetuate segregation on the basis

of race and to inhibit desegregation in the public schools and school systems of Marion County.

11. The State of Indiana, acting through the defendants and their predecessors and otherwise, has engaged in acts, practices, customs, and usages which have had the natural, probable, foreseeable, and actual effect of incorporating into schools and school systems serving Marion County and the Indianapolis metropolitan area public and private residential racial segregation and discrimination, in violation of the right of plaintiff-intervenors not to be segregated on the basis of race in public schools and school districts.

12. The State of Indiana, acting through the defendants and their predecessors and otherwise, has allocated and permitted to be allocated educational resources in a manner that has had the natural, probable, foreseeable and actual effects, in the Indianapolis metropolitan area, of: (a) discriminating on the basis of race against children attending the public schools within the School City of Indianapolis; and (b) establishing and maintaining the pattern of racially separate schools and school systems as described in paragraph eight (8) above, in violation of the rights secured to plaintiff-intervenors by the Fourteenth Amendment to the United States Constitution and the Constitution and laws of Indiana.

13. The defendants' present method of operating separate school corporations in Marion County and the Indianapolis metropolitan area, with the discriminatory effects described herein, is not required for the fulfillment of the State's *bona fide* educational objectives.

14. The defendants have implemented other forms of school organization in the State of Indiana and in and about the Indianapolis metropolitan area which have circumvented, crossed, and otherwise disregarded political boundaries for the purpose of achieving educational objec-

tives within and among single school communities in the Indianapolis metropolitan area and elsewhere in Indiana.

15. Other educationally sound, feasible and practicable alternative methods of school and school district organization are reasonably available to the defendants, and their implementation would fulfill the defendants' educational objectives within the requirement that they operate now and hereafter only unitary schools and school systems.

16. Plaintiff-intervenors reallege and incorporate here by reference, as if fully set out, the allegations of paragraphs 3, 8, 9, 10, 11, and 12 of the complaint of plaintiff United States filed on May 31, 1968.

WHEREFORE, plaintiff-intervenors pray that this Court adjudge, decree, and declare that Chapter 186 of the Indiana Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969 are unconstitutional, null, and void, insofar as they effect racially separate public schools and school systems in Marion County and the Indianapolis metropolitan area.

Plaintiff-intervenors further pray that the defendants, their agents, servants, employees, and all persons in active concert or participation with them be preliminarily and permanently enjoined and restrained to take forthwith all steps reasonably necessary to secure to plaintiff-intervenors their right to attend racially nonsegregated and nondiscriminatory schools and school systems, including if necessary:

(a) the consolidation or merger of the defendant school systems in all aspects of school operation and administration, including but not limited to, the appointment of an acting superintendent to manage the consolidated systems, the merger of the existing Boards of Education pending the selection by election, appointment, or otherwise of a new Board of Education representative of the consolidated system, and

further requiring that board shall be the successor Board of Education for the defendant school systems assuming all rights, powers, responsibilities, duties and obligations presently held, in whole or in part, by the defendant school boards; and further requiring that each defendant shall, by withholding of funds or accreditation and by the exercise of any and all powers available to each, insure the full cooperation of the other defendants and the prompt accomplishment of said consolidation or merger; or

(b) the adoption and implementation by all defendants of such agreements, contracts, or other arrangements with respect to the operation of educational systems in the Indianapolis metropolitan area as will secure to plaintiff-intervenors equal educational opportunities in nonsegregated and nondiscriminatory schools and school systems;

Plaintiffs further pray that this Court require the defendants to prepare and submit for approval of the Court a plan for the operation of all public schools within the defendant school systems in conformity with the requirements of the Fourteenth Amendment, including but not limited to, the nondiscriminatory allocation of resources, the establishment of schools, pupil populations, staffs, faculties, transportation routes and extracurricular activities which are not racially identifiable, and to be effective at the earliest possible date.

Plaintiff-intervenors further pray that this Court allow them their costs herein and reasonable attorneys' fees.

Plaintiffs further pray for such other, further or additional relief as to the Court may appear just and necessary.

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Certificate of Service.

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